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No. 07-1004

IN THE
Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C.,

Petitioners,

v.

MARK TREESH, Commissioner for the Department of Revenue for the Commonwealth of Kentucky,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* PUBLIC KNOWLEDGE, CONSUMER FEDERATION OF AMERICA IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. A Determination of the Unconstitutionality of Discriminatory Taxes is Critical to MVPD Consumers Because Schemes Such as Kentucky's Harm Competition 5

A. States Have Incentives to Disadvantage Cable's Primary Competitor in the MVPD Market 6

B. Competition in the MVPD Market Benefits Consumers 7

1. Competition in the MVPD Market Promotes a Diversity of Voices Critical to a Democratic Society. 8

2. Competition in the MVPD Market Provides Economic Benefits to Consumers 10

3. Competition in the MVPD Market Provides Service Improvements to Consumers 12

4. Rural Consumers Gain Additional Benefit from DBS Availability 13

C. Congress Has Turned to Competition to Protect Consumers in the MVPD Market .. 14

D. Price Matters Because MVPD Consumers are Price-Sensitive 19

II. The Sixth Circuit's Decision Raises an Issue of National Importance Because It Allows States to Sacrifice Innovation and Efficiency in Favor of Protectionism 21

A. State Protectionism Will Harm New Technologies in the MVPD Market..... 21

B. Kentucky's Tax Schemes Will Inhibit Competition in Non-Video Markets As Well 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Turner Broad. Sys. v. F.C.C.,
512 U.S. 622 (1994) 8

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 2, 7

FEDERAL CONSTITUTION, STATUTES, AND LEGISLATIVE HISTORY

138 Cong. Rec. H8671, H8671 (daily ed. Sept. 17, 1992) (statement of Rep. Markey) 15

138 Cong. Rec. S14583, S14583 (daily ed. Sept. 22, 1992) (statement of Sen. Lieberman) 15

An Act to Amend the Communications Act of 1934 to Provide a National Policy Regarding Cable Television
§ 612, 47 U.S.C. § 532(g) (1984) 14

Cable Television Consumer Protection and Competition Act of 1992,
Pub. L. No. 102-385, 106 Stat. 1460 (1992)

§ 2 (codified at 47 U.S.C. § 521 note) 6, 8, 17

§ 628, 47 U.S.C. § 548 ..... 16, 17

§ 613, 47 U.S.C. § 533 ..... 18 n.4

§ 612, 47 U.S.C. § 532 ..... 18 n.4

§ 623, 47 U.S.C. § 543 ..... 18 n.4

Internet Tax Freedom Act Amendments Act of 2007, Pub. L. 110-108, 121 Stat. 1024 (2007) (codified at 47 U.S.C. § 151) 23

Satellite Home Viewer Improvement Act of 1999, S. 1948, 106th Cong. (1999) 18

Senate Report (Commerce, Science, and Transportation Committee) on Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133 15

FCC MATERIALS

Federal Communications Commission, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* (Nov. 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf ..... *passim*

Federal Communications Commission, *Satellite Home Viewer Protection Act Page*, *at* http://www.fcc.gov/mb/shva 18

In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video, 12th Annual Report, F.C.C. 06-11 (Feb. 2006) ..... *passim*

In re Comcast Corp., 17 F.C.C.R. 23246 (2002) 8

MISCELLANEOUS

Adam Smith, *The Wealth of Nations* (1776) 5

Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast*

Satellites and the Competition With Cable TV, 72 Econometrica 351, 373 (2004)..... 6, 10

F. M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin Co. 1990) 5

Robert W. Crandall & Robert Litan, *The Benefits of New Wireline Video Competition for Consumers and Local Government Finances* (2006), *available at* http://www.criterioneconomics.com/docs/TELCO_MVPD_Entry_Cable_Franchise_FINAL.pdf 20

U.S. Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, No. GAO-05-257 (Apr. 2005), *available at* http://gao.gov/..... 11, 13

Verizon FiOS TV, at http://www22.verizon.com/Content/FiOSTV/... 12

INTEREST OF THE *AMICI*

Public Knowledge and Consumer Federation of Amerca respectfully submit this brief in support of the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.[1]

Public Knowledge is a Washington, D.C. based not-for-profit public interest advocacy and research organization. It is dedicated to protecting consumers' rights and the core democratic principles of openness, public access, and the capacity to innovate and compete in the digital age. Public Knowledge seeks to guard these cultural values at all layers of our communications systems through legislative, administrative, legal, and grass-roots efforts.

Consumer Federation of America is an advocacy, research, education, and service organization which works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and each has been given at least 10 days notice of *amici*'s intention to file. Letters of consent have been filed with the Office of the Clerk of this Court.

courts. In addition to its policy efforts, Consumer Federation of America conducts research, educates the public and policymakers, and supports other like-minded organizations on consumer issues.

The decision below has broad implications for consumer choice and costs as well as for the diversity of voices in the video and Internet services which are piped daily into 95 million American homes. The Sixth Circuit has provided a recipe for state legislatures to circumvent this court's ruling in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), and to favor in-state interests at the expense of interstate commerce. If schemes such as this, designed to create an anticompetitive market, are permitted to continue in the face of contrary constitutional law, the cost of favoring in-state interests will be paid for by consumers, speakers, and innovators. *Amici curiae* uniquely represent the interests of consumers and Internet users in a proceeding which is otherwise about the interest of states versus the interest of certain video providers.

None of *amici curiae* is affiliated with any cable company, Direct Broadcast Satellite ("DBS") provider, other Multichannel Video Programming Distributor ("MVPD"), or party to this action.[2]

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[2] *Amici* would also like to acknowledge the assistance of Michael Weinberg, George Washington University Law School, in the preparation of this brief.

SUMMARY OF ARGUMENT

Tax schemes such as the one at issue in this case raise issues of national importance because they harm the competition which is critical to ensuring that MVPD consumers receive the best service and have access to the greatest diversity of voices at the lowest price.

States have demonstrated time and time again that they have incentives to find ways to evade the Dormant Commerce Clause to financially burden out-of-state commerce in order to favor in-state economic interests. The MVPD market is simply one more market where one incumbent industry–cable–has a significant in-state footprint, generating local jobs and revenues, while a new competitor–DBS–has almost no in-state presence at all. Kentucky's tax-and-pay setup is an attempt to dodge precedent and engage in prohibited discriminatory taxation in this market.

Competition in the MPVD market benefits consumers in three broad ways. First, competition in the MVPD market translates to diversity of voices heard by the vast majority of American households who subscribe to multichannel services, and for the growing number who choose to express themselves through Internet services provided by those same companies. Second, competition disciplines prices across providers, lowering costs for all subscribers to MVPD services and increasing the availability of services nationwide. Third, competition increases quality of service to

multichannel customers. DBS-based competition in particular has a demonstrated track record of encouraging innovation in the market, providing consumers with advanced services including better picture quality, music offerings, and Internet and telephone services. Finally, these benefits are felt even more strongly by rural customers, who may have no locally-based MVPD option at all.

Congress and the FCC have repeatedly demonstrated their commitment to achieving consumer benefits through competition in the MVPD market. By leveling the playing field, Congress has sought to stop runaway cable pricing and encourage innovation. To a large extent, it has succeeded. But to the extent that MVPD prices still outpace inflation, the problem can be partially attributed to the discriminatory treatment of cable's primary competitor in a market where consumers, when faced with higher prices, are very likely to switch providers or leave the market.

Finally, the national issues raised by the Sixth Circuit's decision apply not only to the current MVPD competitors, but to future entrants and to completely unrelated markets as well. Creating an anticompetitive market by favoring businesses with an in-state footprint will harm consumers by restricting competition and innovation in video services, Internet services, and new services which have not yet been imagined. We ask that this court grant the petition for certiorari in order to determine that

states cannot engage in discriminatory taxation, no matter what regulatory structure they use to disguise the discriminatory purpose.

ARGUMENT

I. A DETERMINATION OF THE UNCONSTITUTIONALITY OF DISCRIMINATORY TAXES IS CRITICAL TO MVPD CONSUMERS BECAUSE SCHEMES SUCH AS KENTUCKY'S HARM COMPETITION

> *In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be more.*

Adam Smith, *The Wealth of Nations*, Book II, Chapter II (1776). It is now axiomatic that competition is beneficial to consumers, both because it increases choice and because it lowers prices. For a more modern, in-depth explanation of the consumer benefits of competition, see F. M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin Co. 1990).

As Congress has recognized, the pro-speech and pro-consumer effects of competition apply in the MVPD world as well: "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media," and "[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market

power for the cable operator as compared to that of consumers and video programmers." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a)(2), 2(a)(6), 106 Stat. 1460, 1460 (1992) (codified at 47 U.S.C. § 521 note) [hereinafter *1992 Cable Act*].

A. States Have Incentives to Disadvantage Cable's Primary Competitor in the MVPD Market

DBS is the single largest competitor to cable, representing 29% of MVPD subscribers as of June 2006; all other non-cable competitors combined make up only 2.6% of the market. Federal Communications Commission, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 3 (Nov. 2007) [hereinafter *13th Annual Report Release*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.[3] According to one report, if DBS were removed from the market entirely, cable prices would be 15% higher and quality would fall, hurting consumers on two fronts. Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition With Cable TV*, 72 Econometrica 351, 373 (2004).

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[3] As of the filing of this brief, the full text of the 13th Annual Report was not yet public, so only the factual findings reported in the public announcement are cited.

As described in petitioners' brief, states derive significant benefits from cable's in-state activities, while DBS providers have little or no in-state presence. This provides states with the incentive to flout the nationwide competition which would benefit consumers. And while the damage to consumers is hidden in costs to out-of-state operators, lack of long-term innovation, and slow price increases, the in-state benefit to cable companies and the state itself through employment, construction, and franchise fees is easy to see.

This anti-competitive incentive is what the Dormant Commerce Clause is supposed to prevent: schemes "designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)).

B. Competition in the MVPD Market Benefits Consumers

The general benefits of competition are realized by consumers in the MVPD market in three ways: First, competition encourages MVPDs to diversify their offerings, resulting in a broader diversity of speech being available to consumers. Second, it encourages innovation, creating new services and improving quality for viewers. Finally, competition reins in prices for all MVPD subscribers. To the extent that tax schemes such as the one at issue hurt competition, they also hurt consumers in all

three areas.

1. Competition in the MVPD Market Promotes a Diversity of Voices Critical to a Democratic Society.

As Congress has recognized, there is a "substantial . . . First Amendment interest in promoting a diversity of views provided through multiple technology media." *1992 Cable Act* § 2(a)(6). This court has also recognized this interest: "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622 (1994). The FCC, too, has echoed this court's observation that "[i]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *In re Comcast Corp.*, 17 F.C.C.R. 23246, ¶ 27 (2002) (quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 663 (1994)).

As of June 2006, there were approximately 95.8 million households in the United States which subscribed to an MVPD service. *13th Annual Report Release* at 3. According to the 2000 census, there are roughly 105 million households in the United States. *See USA Quickfacts*, United States Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/00000.html. And for the over 90% of households which

subscribed to an MVPD service in 2004 and 2005, the average one tuned into television for over eight hours per day. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video, 12th Annual Report* at 3, F.C.C. 06-11 (Feb. 2006) [hereinafter *12th Annual Report*].

In America today, the delivery of video services to homes is much more than an entertainment business. It is a primary speech outlet–one through which American households view over 275 billion hours of television-based speech per year. DBS has already made progress in promoting consumer choice and diversifying voices on this communications channel. In 2006, the FCC's annual report on competition in the MVPD market stated that "[c]ompetition in the delivery of video programming services has provided consumers with increased choice, ... In particular, the effect of DBS competition has resulted in the addition of networks to cable operators' channel line ups, . . ." *12th Annual Report* at 4. Further, DBS's nationwide structure allows it to provide a wider variety of options than local cable franchises. For instance, while foreign-language programming may not be economically viable in a given cable market, DBS can aggregate the demand for it nationwide and offer it to consumers in every market across the United States.

Video services are also no longer one-way channels for funneling information to consumers;

both cable and DBS providers (typically through joint ventures) offer Internet access, through which millions of Americans are expressing themselves to a global audience. As of 2003, 53 million American adults had posted their own text, pictures, or video on the Internet for all to see. *See* Pew Internet and American Life Project, *Content Creation Online* (Feb. 29, 2004), *available at* http://www.pewInternet.org/pdfs/PIP_Content_Creation_Report.pdf. Any damage to the competitiveness of DBS-based MVPD services will also be felt by those who subscribe to related Internet services.

Reducing competition to promote in-state commercial interests does not just raise prices for consumers, but reduces the diversity of voices and speech venues available to all Americans.

2. Competition in the MVPD Market Provides Economic Benefits to Consumers

MVPD competition from DBS has already had the effect of lowering prices for subscribers across all multichannel providers. One study concluded that without DBS's entry into the market, cable prices would be 15% higher. Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition With Cable TV*, 72 Econometrica 351, 373 (2004).

But current levels of competition have not been enough to completely discipline pricing.

This past year, the FCC reported that despite technological improvements in video delivery, prices in the MVPD market continue to outpace the general level of inflation. *13th Annual Report Release* at 1. Notably, "DBS competition has not checked cable prices to the same extent as competition from wireline providers"– providers who, like cable, have a significant in-state presence. *Id.* at 1; *See also* U.S. Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets* at 33, No. GAO-05-257 (Apr. 2005) [hereinafter *GAO Report*], *available at* http://gao.gov/ (reporting that cable prices were 16% lower in markets with a second cable competitor).

In the same way that competition lowers prices for consumers, reduced competition raises them. If it is allowed to proceed unchecked, discriminatory taxing will raise prices not just for DBS users, but for all MVPD subscribers. Especially given the price sensitivity of MVPD customers, which is discussed below, differential treatment of DBS and cable services in a number of states could account for DBS's failure to fully control cable price increases despite its positive effect on other areas, including network availability, picture quality, and overall innovation.

3. Competition in the MVPD Market Provides Service Improvements to Consumers

In addition to delivering more diverse voices and lowering prices, the FCC noted that MVPD competition provided consumers with "better picture quality[] and greater technological innovation." *12th Annual Report* at 4. The summary of the 2006 report indicates that consumers continue to receive these benefits. *See 13th Annual Report Release* at 1. Specifically, cable operators have made investments which enable "more channels of basic and digital cable services, premium movie services, pay-per-view service, high-definition service, high-speed Internet access services, CD-quality music, cable telephony, and more personalized programming options." *12th Annual Report* at 22.

The FCC attributes these new services in large part to competition from DBS; and in response to cable's new services, DBS providers have expanded their own offerings: "Cable operators have responded to the growth of DBS and its competitive service offerings by, among other things, expanding their channel line ups and bundling video service with other service offerings, such as cable modem service or telephone service. . . . These competitive efforts are matched by DBS operators' offering of local broadcast channels, additional sports and international programming, and advanced set-top boxes with digital video recorder (DVR)

capabilities." *12th Annual Report* at 4.

The Government Accountability Office ("GAO") also reports that DBS penetration is 20% higher in places where cable is not offering these advanced services, suggesting that DBS is performing well both at spurring innovation on the cable side and providing a viable consumer alternative to cable services. *See GAO Report* at 9. Taxes which disproportionately burden DBS for the benefit of cable will slow these innovations, as they will be less necessary for cable to compete in the marketplace.

4. Rural Consumers Gain Additional Benefit from DBS Availability

In addition to broadly competing with cable, DBS has a much higher adoption rate in rural areas. *GAO Report* at 2. In areas where no cable service is available at all (which are often rural), DBS adoption rates are 53% higher. *Id.* at 2. This means that in such regions–where DBS is always available–discriminatory tax schemes will directly translate to an increase in consumer costs, driving a significant fraction of consumers out of the market altogether and producing higher prices for the rest. Further, any harm to DBS in markets which have cable as well is visited more powerfully on rural customers, who do not have the benefit of a state-preferred option available.

C. Congress Has Turned to Competition to Protect Consumers in the MVPD Market

Both Congress and the FCC have recognized the value of competition to consumers in the MVPD market and the dangers of anti-competitive behavior by local incumbents. This recognition and the accompanying steps taken to promote competition demonstrate the importance of a level playing field both to consumers and to the health of interstate commerce.

As early as 1984, Congress recognized the potential for cable to corner the MVPD market and reduce the diversity of voices heard by consumers. To combat this possibility, it enacted the "70/70 rule," which states that "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources." An Act to Amend the Communications Act of 1934 to Provide a National Policy Regarding Cable Television § 612, 47 U.S.C. § 532(g) (1984). Last year, the FCC announced that cable had likely met this threshold; because not all sources agreed, the Commission then ordered cable companies to provide their own data to confirm or deny that the threshold had been met. *13th Annual Report*

Release at 1, 3. Whether or not the 70/70 threshold has technically been met, cable market share has grown to the point that it threatens the diversity which Congress intended to create.

In 1992, Congress passed–as the only veto override in the presidency of George H. W. Bush–the *1992 Cable Act*, which was a sweeping attempt to curb cable's monopoly power by encouraging competition with other MPVDs. At the time, cable had no competition at all:

> [T]he cable industry is a monopoly. That is why we are here today. It has absolutely no competition across this country. As a result, . . . consumers are left to the mercy of the cable industry, which has resulted in a three times the rate of inflation increase in their rates every year for the last 8 years in a row.

138 Cong. Rec. H8671, H8671 (daily ed. Sept. 17, 1992) (statement of Rep. Markey). In considering the Act, the Senate Commerce, Transportation, and Science committee noted that "[t]his evidence [of historical and projected rate increases] provides the Committee with significant and legitimate reasons to be greatly concerned that subscribers, in a deregulated marketplace, are at the mercy of cable operators' market power." *Senate Report (Commerce, Science, and Transportation Committee) on Cable Television Consumer Protection and Competition Act of 1992*, S. Rep. No. 102-92 at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1140.

Congress sought to remedy this monopoly power through competition: "Competition, not Government intervention, is the best long-term regulator of this marketplace. Competition gives the best service and the best price." 138 Cong. Rec. S14583, S14583 (daily ed. Sept. 22, 1992) (statement of Sen. Lieberman). As Senator Lieberman recognized, consumers benefit most when states do not engage in impermissible protectionism to the detriment of interstate commerce and when competition is allowed to flourish.

To combat cable's monopoly power and promote genuine MVPD competition, the *1992 Cable Act* commanded the FCC to promulgate regulations which would prohibit this type of discrimination "in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies." *See 1992 Cable Act* § 628, 47 U.S.C. §§ 548(c)(2), 548(c)(1). In fact, section 628 of the *1992 Cable Act* is titled "Development of competition and diversity in video programming distribution," *see 1992 Cable Act* § 628, 47 U.S.C. § 548, and its stated purpose is

> to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite

> broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

1992 Cable Act § 628, 47 U.S.C. § 548(a).

One of the anti-competitive forces which the *1992 Cable Act* sought to limit was the vertical integration of the cable market. Cable MVPDs also owned numerous channels, and would only offer them to MVPD competitors at usurious prices, if at all. The preamble to the Act described the situation thus:

> The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems.

1992 Cable Act § 2(a)(5). To combat this, Congressed imposed "program access" rules, which enabled competition by forcing cable companies to provide cable-owned channels to competitors at reasonable rates. *See 1992 Cable Act* § 628, 47 U.S.C. § 548. Without these program access rules, MVPD competitors like DBS would not have been able to compete, and

cable would likely still be a monopoly.[4]

Congress has since passed other legislation intended promote competition between DBS and cable: The Satellite Home Viewer Improvement Act of 1999 sought to achieve a similar purpose as the *1992 Cable Act* by ensuring equal access by competitors to local programming. According to the FCC, its goal is "to place satellite carriers on an equal footing with local cable television operators when it comes to the availability of broadcast programming, and thus gives consumers more and better choices in selecting a multichannel video program distributor (MVPD), such as cable or satellite service." Federal Communications Commission, *Satellite Home Viewer Protection Act Page*, *at* http://www.fcc.gov/mb/shva/; *s ee also* Satellite Home Viewer Improvement Act of 1999, S. 1948, 106th Cong. (1999).

When taken together, these laws explicitly

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[4] Through the *1992 Cable Act*, Congress also sought to promote competition in numerous other ways. It imposed explicit ownership restrictions to limit vertical and horizontal integration in the MVPD market. *See 1992 Cable Act* § 613, 47 U.S.C. § 533. Through "leased access" rules, it ensured that cable companies would provide channel capacity to competitors' channels, which they might otherwise choose not to deliver to consumers. *See 1992 Cable Act* § 612, 47 U.S.C. § 532. And by regulating rates in the MVPD market, it helped to mitigate the anticompetitive effects of cable's monopoly power. *See 1992 Cable Act* § 623, 47 U.S.C. § 543.

demonstrate Congress' belief in the importance providing a level playing field for MVPDs, and their preference to regulate only to the extent necessary to ensure fair competition between multichannel distributors. The problem is not solved; cable now controls roughly 70% of the market, *See 13th Annual Report Release* at 3, and while it is no longer a monopoly, the threat of unchecked market power, bolstered by discriminatory taxation, still looms large. And in areas such as discriminatory taxation, which exacerbate the problem and which are governed constitutionally, no such regulations should be necessary.

Protectionism through discriminatory taxation is constitutionally prohibited and contrary to federal policy. Congress' stress on the importance of competition in the MVPD market merely underlines the importance of a clear Supreme Court ruling that states may not evade the Dormant Commerce Clause through schemes such as the one at issue here.

D. Price Matters Because MVPD Consumers are Price-Sensitive

Consumers in the MVPD market are price-sensitive, meaning that small increases in the price of one provider will produce comparatively large shifts of consumers away from that provider, often to competitors. As a result, differential taxation will directly impact competition and harm all of the goals discussed above.

In summarizing eight studies of price elasticity in the MVPD market, two Brookings Institution fellows reported that "[t]he studies . . . all conclude that the own-price elasticity of demand for basic cable television service is price elastic. That is, a one percent decrease in cable price will induce more than a one percent increase in subscribers." Robert W. Crandall & Robert Litan, *The Benefits of New Wireline Video Competition for Consumers and Local Government Finances* at 7 (2006), *available at* http://www.criterioneconomics.com/docs/TELCO_MVPD_Entry_Cable_Franchise_FINAL.pdf. Individually, the studies showed that such a 1% price change would change demand between 1.5% and 5.9%. *Id.* at 7.

One of these studies further showed that "the cross-price elasticity of demand between expanded basic cable prices and DBS subscribership was 0.9. This result means that a one percent decrease in the price of expanded basic cable would induce a 0.9 percent decrease in DBS subscribership, which indicates that consumers treat these two services as close substitutes." *Id.* at 6 (citing Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition With Cable TV*, 72 Econometrica 351, 369 (2004)).

When taken together, these studies suggest that a five percent change in price or costs–such as that created by the Kentucky taxing scheme–is likely to produce a drastic effect on

competition. Assuming the high end of the range described by Crandall & Litan, such a switch could extend to as many as 26% of DBS subscribers, and in any event, would produce significant competitive harm, in turn increasing overall prices paid and reducing quality of service and the diversity of voices received by all American consumers.

II. THE SIXTH CIRCUIT'S DECISION RAISES AN ISSUE OF NATIONAL IMPORTANCE BECAUSE IT ALLOWS STATES TO SACRIFICE INNOVATION AND EFFICIENCY IN FAVOR OF PROTECTIONISM

A. State Protectionism Will Harm New Technologies in the MVPD Market

New competitors to cable are entering the marketplace; for instance, Verizon is currently rolling out television and Internet services over fiber optic cables. *See, e.g.*, *Verizon FiOS TV*, at http://www22.verizon.com/Content/FiOSTV/. Other emerging competitors are Internet-based: "The amount of web-based video provided over the Internet continues to increase significantly each year." *12th Annual Report* at 7; *13th Annual Report Release* at 4. Analysts suggest that the number of people worldwide who subscribe to Internet-based television services, or IPTV services, will grow to 13.5 million in 2007 and to as many as 72.6 million by 2011. *See IPTV Global Forecast – 2007 to 2011: Executive Overview*, MRG Media Research Group, Inc. (Oct. 2007), *available at*

http://www.mrgco.com/TOC_IPTV_GF1007.html.

IPTV services can be offered over almost any network, and so appear in many different forms. In some cases, such services are bundled with cable-based or DSL-based Internet services. In others, they are sold by third parties, and consumers receive their network services from existing services. Will states be allowed to determine which innovative services succeed based not on merit or consumer choice, but on tax structures which penalize those providers who do not use in-state franchise-based arrangements?

Future technologies can only be financed and rolled out if investors and innovators know that the market, and not in-state interests, will decide who succeeds. Unless this court determines that new technologies will be able to compete on equal footing with cable incumbents, they face uncertainty and the potential for discriminatory treatment, reducing investment and innovation in new MVPD services on a national scale.

B. Kentucky's Tax Schemes Will Inhibit Competition in Non-Video Markets As Well

When the *1992 Cable Act* was passed, who could have imagined the impact the Internet would have not just on video distribution, but on global communications and speech? The tax structure created in Kentucky could be applied to protect in-state interests not only in the

MVPD market, but in any market where a state can collect franchise fees or the equivalents for use of in-state resources and rights of way.

Internet services are but one example–albeit a closely parallel one–of how this can work. Some Internet services, such as cable-based or DSL-based providers, will have a strong in-state presence involving local investment and employment. Others, such as satellite-based Internet services, will have almost no in-state presence. *See 12th Annual Report* at 83. Emerging services, such as land-based wireless or mesh networks, may land somewhere in between. Competition between these different technologies and services needs to occur on a level playing field, where the benefits to consumers and the real cost of service determine which innovations succeed and fail. When states introduce additional costs based on their evaluation of each technology's in-state footprint, the benefits of our national unitary economy are not realized, and innovation is stifled.

The specter of state protectionism is encountered not only in the provision of Internet access, but in other traditionally in-state markets which now can be reached nationally or globally from any computer. Examples include Internet-based retail sales, which compete with in-state brick-and-mortar offerings, and Internet-based radio, which competes with local radio stations. And while there is currently a moratorium on state taxation of electronic commerce, that moratorium is only temporary,

and is currently set to expire in 2014. *See* Internet Tax Freedom Act Amendments Act of 2007, Pub. L. 110-108, 121 Stat. 1024 (2007) (codified at 47 U.S.C. § 151).

Will states be able to enact tax structures designed to burden the out-of-state interests to give the in-state offerings a competitive edge? In the same way that we cannot see now how the Internet marketplace will develop, we cannot predict what new markets will open up. If states are allowed to enact thinly disguised protectionism through tax-and-pay schemes such as the one here, entirely new technologies and innovations with national or global scope may fall prey to the self-interest of individual states. The question that this court should answer is whether states will be allowed to interfere with interstate commerce, introduce market inefficiencies, and stifle innovation in both old and new markets in order to protect in-state economic interests.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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